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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA, *Appellant*

v.

PHILLIPSBURG NATIONAL BANK AND TRUST COMPANY, SECOND NATIONAL BANK OF PHILLIPSBURG, and WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

BRIEF OF APPELLEE, WILLIAM B. CAMP, COMPTROLLER OF THE CURRENCY, INTERVENOR

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QUESTIONS PRESENTED BY APPELLANT

1. Whether the district court erroneously rejected commercial banking as a relevant product or service market in which to test the competitive effect of bank mergers in small communities.

2. Whether, in an antitrust action challenging a proposed merger of banks located in a community in which

the banking business is predominantly local, the court may properly refuse to consider the merger's probable effect on competition in that community because, on the basis of evidence of general social and economic integration, it deems the relevant geographic market to be a broad multi-community area.

3. Whether, in such an action, the court's consideration of the "convenience and needs of the community to be served" is legally insufficient if the "community" whose "needs" are considered is narrower than the relevant geographic market in which the anticompetitive effects of the merger are measured.

4. Whether, in any event, the court below erred in its determination of the convenience and needs issue by failing adequately to consider whether the same benefits could be achieved by less anticompetitive means.

STATEMENT

The Proceedings

On April 14 and 17, 1967 Phillipsburg National Bank and Trust Company (hereinafter referred to as Phillipsburg National) and the Second National Bank of Phillipsburg (hereinafter referred to as Second National) approved by their respective Boards of Directors an agreement to merge Second National with and into Phillipsburg National.

The Comptroller of the Currency, being the responsible regulatory agency since the resulting bank was to be a national bank,[1] filed a decision approving the merger on December 18, 1967. Said opinion was rendered after consideration of the application of Phillips-

[1] 12 U.S.C. 1828(c).

burg National and Second National; a complete investigation by the Comptroller's office, including a full field investigation and, consideration of the requested reports on the competitive factors submitted by the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Department of Justice (Antitrust Division).[2] Also, a Hearing was held on August 14, 1967 by the Comptroller of the Currency.

The present action was filed by the Department of Justice on January 16, 1968, alleging the proposed merger violated Section 7 of the Clayton Act, and seeking an injunction under said Act.

As a matter of right set forth in the Bank Merger Act of 1966[3] (hereinafter referred to as BMA-66) the Comptroller of the Currency intervened in the action on February 21, 1968.

Answers were filed by defendant banks and intervenor. Pre-trial briefs were filed by all parties on April 19, 1968. Trial commenced on September 11, 1968 and concluded on September 26, 1968.

The District Court's opinion was handed down on October 14, 1969.[4] On said date, after the opinion was rendered, an argument on lifting the automatic stay was heard by the district court. During the course of

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[2] These agencies are required by law (12 U.S.C. § 1828(c) to report on the competitive factors, and so do not consider the convenience and needs of the community to be served, or the financial and managerial resources and the future prospects of the banks involved.

[3] 12 U.S.C. § 1828(c), as amended by the Bank Merger Act of 1966, Public Law 89-356, 64 Stat. 892.

[4] Reported in 306 F. Supp. 645.

the argument which was continued to and concluded on October 20, 1969 the Court opened the record to receive additional evidence from the Intervenor relating to the changed conditions in New Jersey which took place subsequent to the trial, as a result of changes in the New Jersey banking laws. Evidence was also received from the Department of Justice. After receiving the supplementary evidence the Court stated[5] that in light of the evidence adduced, the supplementary evidence . . . "tends to corroborate my findings of fact that the amended New Jersey statute now creates greater ease of entry into the market."

THE FACTS

Background

This case involves the merger of Phillipsburg National, ranking twelfth out of 41 in the defendant banks' market area and Second National ranking nineteenth out of 41 in the defendant banks' market area whose merged assets total only $41,000,000 and who together hold only 3.5 percent of the relevant geographic market, ranking seventh of 40. (A. 502; DX-12, A 802, R. 776). Measured by trust assets, Phillipsburg National ranks 1346th and Second National 2429th out of approximately 3100 banks in the nation with trust powers. (IX-5, A. 839-40, R. 1438).[6] Combined they will have $38,362, 828 in total deposits. (IX-3, A. 837 R. 1438). These two commercial banks are in absolute terms small banks. (R. 1476).

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[5] See pp. 28-29 of the Transcript dated October 20, 1969.

[6] Intervenor's exhibits during trial were marked GI, meaning Government Intervenor, however, to be consistent with appellant's brief they will be referred to in this brief as IX, meaning Intervenor's exhibit.

The ten contested Clayton Act § 7, bank merger cases prior to the instant case, ranged in size from the Manufacturers Hanover case with over $6 billion in assets and 14.47 percent of the market to the First National Bank of Hawaii case with $389.7 million in assets and 33 percent of the market. Said ten cases involved much larger banks in urban areas such as New York City, Honolulu, Hawaii, Houston, Philadelphia, St. Louis, Los Angeles, San Francisco, and Chicago. (IX-1, A. 831, R. 1438) These ten bank merger cases involved trust departments which were among the nations largest. (IX-5, A. 839-50, R. 1438). After the proposed merger Phillipsburg National and Second National would move to the 1323rd place on the list of banks with trust powers in the nation, and its percentage of such trust assets would be less than .005. This resultant bank would hold .87 percent of the total trust assets in the Allentown-Bethlehem-Easton standard metropolitan statistical area and be the ninth ranked bank in terms of trust assets. (IX-5, A. 840, R. 1438)

The significance of this proposed merger is readily seen by comparing its percent of commercial and industrial loans with the ten other contested Clayton Act § 7 bank merger cases. The combined commercial and industrial loans of these two banks would be 14.6 percent of the loan portfolio whereas in the other ten litigated cases the percentages of commercial and industrial loans were 21.6 percent, 38.3 percent, 58.8 percent, 44.4 percent, 39.4 percent, 54.3 percent, 27.8 percent, 58.1 percent, 53.5 percent and 33.4 percent of the loan portfolios. (IX-2, A. 834-5, R. 1438). The loan structure of all commercial banks in the United States shows that commercial and industrial loans are 36 percent of all loans for all banks. (IX-11, A. 854, R. 1438).

The total deposits of the ten contested Clayton A§ 7 bank merger cases ranged from in amounts, for tdates indicated in IX-3 from $5,189,774,639 for tManufacturers Hanover case to $336,415,959 in tFirst National Bank of Hawaii case. The resultabank in the case before this Court will have $3362,828 in total deposits. (IX-3, A. 836-7, R. 1438)

All United States commercial banks in 1967 had percent of their total deposits in demand deposits aof that 38 percent were in IPC (individuals, partneships and corporations) deposits. Commercial bankin Pennsylvania in 1967 had 46.5 percent of their totdeposits in demand deposits and of that 37.8 percewere in IPC deposits. Commercial banks in NeJersey in 1967 had 45.6 percent of their total depositin demand deposits and of that 37.8 percent were iIPC deposits. Phillipsburg National and Second National combined for 1967 had 28.9 percent of its totdeposits in demand deposits and of that 24 percewere in IPC deposits. (IX-8, A. 852, R. 1438)

All United States commercial banks in 1967 had 4percent of their total deposits in savings and of th42.8 percent were in IPC savings. Commercial bankin Pennsylvania in 1967 had 53.5 percent of theitotal deposits in savings and of that 49 percent were iIPC savings. Commercial banks in New Jersey i1967 had 54.3 percent of their total deposits in savingand of that 52.1 percent were in IPC savingsPhillipsburg National and Second National combinefor 1967 had 71.1 percent of its total deposits in savings and of that 69 percent were in IPC savings.

All commercial banks in the United States had on24.3 percent of their loans in real estate loans com

pared with 71.8 percent for Second National and 53.9 percent for Phillipsburg National or 61.4 percent for the combined banks. (IX-11, A. 854, R. 1438).

From an analysis of the activities of the participants to this bank merger it can be concluded they were more like savings and loan institutions than commercial banks. (A. 266-267; 493). Both stressed mortgage loans and both emphasized time and savings deposits rather than demand deposits. (A. 493; DX-4, A. 788, R. 776)

All banks in Phillipsburg, New Jersey do their banking business within a 25 mile radius of Phillipsburg. (A. 43; 51-52; 206; 74; R. 206) The Washington Trust Co. in Washington, N. J. located 12 miles from Phillipsburg (DX-33, A. 813, R. 776) does banking business in a 20 mile radius of Washington; and, the Hunterdon County National Bank located in Flemington, N. J., with branches in Clinton, High Bridge, Spring Mills, Frenchtown and Lambertville does banking business in a wide area which includes Phillipsburg and Easton. It does banking business in a 23 mile radius in every direction. Phillipsburg National does banking business in its home territory. (A. 470-472; 483). The First National Bank of Belvidere located in Belvidere, N. J., which is approximately 11 miles from Phillipsburg does banking business in a 10 to 15 mile radius. (A. 563-564). An Easton, Pa. banker considers the geographic market area for his bank to be all of Northampton and Burke counties in Pa., all of Warren County in N. J., and parts of Monroe and South Carbon Counties in Pa. (A. 388). Union Bank & Trust of Bethlehem's geographic area in Northampton and Lehigh counties in

The total deposits of the ten contested Clayton Act § 7 bank merger cases ranged from in amounts, for the dates indicated in IX-3 from $5,189,774,639 for the Manufacturers Hanover case to $336,415,959 in the First National Bank of Hawaii case. The resultant bank in the case before this Court will have $38,362,828 in total deposits. (IX-3, A. 836-7, R. 1438)

All United States commercial banks in 1967 had 51 percent of their total deposits in demand deposits and of that 38 percent were in IPC (individuals, partnerships and corporations) deposits. Commercial banks in Pennsylvania in 1967 had 46.5 percent of their total deposits in demand deposits and of that 37.8 percent were in IPC deposits. Commercial banks in New Jersey in 1967 had 45.6 percent of their total deposits in demand deposits and of that 37.8 percent were in IPC deposits. Phillipsburg National and Second National combined for 1967 had 28.9 percent of its total deposits in demand deposits and of that 24 percent were in IPC deposits. (IX-8, A. 852, R. 1438)

All United States commercial banks in 1967 had 49 percent of their total deposits in savings and of that 42.8 percent were in IPC savings. Commercial banks in Pennsylvania in 1967 had 53.5 percent of their total deposits in savings and of that 49 percent were in IPC savings. Commercial banks in New Jersey in 1967 had 54.3 percent of their total deposits in savings and of that 52.1 percent were in IPC savings. Phillipsburg National and Second National combined for 1967 had 71.1 percent of its total deposits in savings and of that 69 percent were in IPC savings.

All commercial banks in the United States had only 24.3 percent of their loans in real estate loans com-

pared with 71.8 percent for Second National and 53.9 percent for Phillipsburg National or 61.4 percent for the combined banks. (IX-11, A. 854, R. 1438).

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Pennsylvania and Warren County and portions of Hunterdon County in New Jersey. (A. 457). Easton National Bank, Easton, Pennsylvania, Union Bank, Bethlehem, Pennsylvania, and Merchants National Bank, Allentown, Pennsylvania, all solicit and send travelling bank representatives into the Phillipsburg area seeking all types of banking business. (R. 138-142). There is direct competition between The Lafayette Trust Company in Easton and the Allentown and Bethlehem banks, and the banks in Northhampton County and Phillipsburg. (A. 389-390).

All the Phillipsburg banks and commercial banks in Flemington, Milford, Bethlehem and Riegelsville advertise in the Easton papers. (A. 368-369; 559; (DX-51, A. 825, R. 1090; DX-52, R. 1090-1, R. 1090; DX-53, R. 1090-1, R. 1090; R. 1096). Also an Easton, Pennsylvania savings and loan association and the Nazareth Savings and Loan Association, Nazareth, Pennsylvania advertise in the Easton newspapers. (A. 275; DX-56; A. 828, R. 1091) The Easton Express newspaper's circulation covers a radius of 15-20 miles. It covers the eastern portion of Northampton County, Pennsylvania, and is the dominant newspaper in Warren and Hunterdon counties in New Jersey. (A. 363-364; R. 1080) National companies which advertise in the Easton Express look at the standard metropolitan statistical areas when developing a product or selling an item through advertising. The Allentown-Bethlehem-Easton standard metropolitan statistical area is such a metropolitan area. (R. 1080-1081). Factors backing up the standard metropolitan statistical area concept is the interrelationship of buying throughout the area, i.e., people shop from one area to another. (A. 366)

Phillipsburg National has over 40 percent of its single payment loans emanating from outside of appellant's alleged geographic area, and Second National has 30 percent of such loans outside plaintiff's geographic area. (A. 500; DX-40, A. 819-20, R. 776, D-40). Phillipsburg National has 32 percent of its business by dollar volume emanating oustide plaintiff's alleged geographic area while Second National has 13.8 percent from outside said area. (A. 500). Easton National Bank and Trust has 95 percent of its mobile home loans originating outside plaintiff's alleged geographic area, and 36 percent of its indirect automobile loans originating outside said area. (R. 502). A substantial amount of Phillipsburg National's and Second National's demand deposits, time deposits and real estate loans come from outside plaintiff's alleged geographic area of Easton-Phillipsburg. (A. 500-501; GX-19, G-19; R. 85; G-21, A. 731-2, R. 85). All of this business done outside of plaintiff's alleged geographic area is substantial and demonstrates significant activity outside plaintiff's alleged area. (A. 500-501).

As of May 1967 the Reigelsville branch Reigelsville, Pa., of Girard Trust Bank of Philadelphia had 29.59 percent of its $11,787,400 total savings and demand deposits coming from customers with addresses in Easton or Phillipsburg. Of its total savings accounts $583,771 or 11.10 percent came from customers in Milford, New Jersey. This branch of Girard Trust had $1,793,700 or 37.16 percent of its savings bond accounts from customers with addresses in Easton, Pa. The Reigelsville branch derives 1/3 of its business from Phillipsburg-Easton and environs although it is located in Bucks County, Pa. (A. 498; DX-11, A. 801, R. 776). Said branch of Girard Trust advertised in

Reigelsville, Warren and Hunterdon counties in New Jersey and in Easton, Pa. (DX-21, R. 776 R. 776; DX-22, R. 776 R. 776; DX-25 R. 776 R. 776; DX-27, R. 242, R. 242).

Said Reigelsville branch had 95 percent or $5,005,307 of its savings accounts coming from addresses within intervenor's and defendant's defined geographic areas, while 18.8 percent came from addresses within plaintiff's defined area. 87 percent or $1,397,175 of the demand deposits and 90.70 percent or $4,469,200 the savings bond accounts in the Riegelsville branch came from addresses within intervenor's and defendant's defined geographic areas. (DX-11, A. 801, R. 776).

The trading area to be considered for the banks in this merger is all of Warren County, Northwest portions of Hunterdon County in New Jersey, Northeast portions of Bucks County, Northampton and Lehigh Counties in Pennsylvania. (A. 496; 544).

Because of the shopping and working patterns existing in the intervenor's and defendant's trading area, the good highway system and the short driving time involved, convenient banking alternatives exist for a resident of Phillipsburg or any other town within the area, throughout the entire area. (A. 195-196; 366; 499)

The Hess Brothers, Allentown, Pa., delivery schedule shows 3 deliveries per week to Phillipsburg for furniture and other goods. (A. 499; DX-34, R. 776, R. 776; DX-35, R. 776, R. 776). McGinley Mills mailing list of 18,444 persons who signed their book in their Phillipsburg store requesting they be notified of sales shows 12,712 with addresses within intervenor's and defendant's trading area and a substantial num-

ber from Allentown and Bethlehem. (A. 330-331; DX-50, A. 824, R. 1004)

Two Phillipsburg automobile dealers, a food department store owner, a trucking company, an appliance dealer, and a contractor testified as to their trading area, which ranged from a 15 to a 35 mile radius. (A. 423-424; 428; 432-433; 437; 533-534). Orr's Department Store delivers merchandise free throughout the Allentown-Bethlehem-Easton standard metropolitan statistical area. (DX-57, R. 1102-4; R. 1103). Customers will shop at Orr's Store in Phillipsburg and go to the Orr's Store in Bethlehem and shop on the same day. The business and shopping geographic area is a 25 mile radius of Phillipsburg. (A. 372-373)

The labor force in the intervenor's and defendant's trading area is mobile. Because of the mobility of the labor force people who work in Phillipsburg, Bethlehem, Nazareth and Reigelsville will work in Easton. (A. 389). Almost one half of the people working at the Ingersoll Rand plant in Phillipsburg come from Easton, Bethlehem and Allentown. (A. 258; 287). Employees of Reigel Paper Co., Milford, New Jersey; Sanco Dye Works, Phillipsburg; and Orr's Department Store in Phillipsburg commute to work from such towns as Easton, Bangor, Nazareth, Bethlehem, Allentown, Washington, Belvidere, Warren Glen, Flemington, and Hughesville (A. 259-260; 373-374; 499-500; 45-46; DX-36, A. 814-5, R. 818). The Allentown, Bethlehem, Easton and Phillipsburg area is one integral area. (A. 366-367)

The mileage to and from Phillipsburg in the trading areas contended by intervenor and defendant range

from 6½ miles from Nazareth, Pa., and 7 miles from Bloomsburg, N. J., in Hunterdon County to 24½ miles from Blairstown, N. J. in Warren County. Allentown is 16 miles west of Phillipsburg. The driving times in said area range as follows: 6 minutes from Riegelsville, Pa., 11 minutes from Washington, N. J. in Warren County; to 25 minutes from Allentown, Pa., and, 27 minutes from Hackettstown, N. J. in Warren County. (DX-33, A. 813, R. 776)

Phillipsburg National has 2.0 percent of the total commercial banking assets in Intervenor's Trading Area B, Second National has 1.4 percent, and the resultant bank would have 3.4 percent. (IX-25, A. 863, R. 1438) Phillipsburg National has 2.0 percent of the total deposits of all commercial banks in Intervenor's Trading Area B, Second National has 1.5 percent, and the resultant bank would have 3.5 percent. (IX-18, A. 857, R. 1439, IX-23, A. 862, R. 1438). Phillipsburg National has 2.3 percent of the loans of all commercial banks in Intervenor's Trading Area B, Second National has 1.7 percent of the loans, and the resultant bank would have 4.0 percent. (IX-20, A. 859, R. 1438).

The merged Phillipsburg National and Second National would have 2.8 percent of the IPC demand deposits of all commercial banks in Intervenor's Trading Area B, and 3.8 percent of the IPC time deposits. (IX-18, A. 857, R. 1439).

Economic and Industrial Growth

Downtown Phillipsburg has deteriorated (A. 292; R. 280). Easton and Phillipsburg are stagnant. (A. 319). The population of Phillipsburg has stayed at about 18,500 over the last 15 years. (A. 262). The downtown area in which the main offices of Phillips-

burg National and Second National are located is right near skid row. The area lacks modern buildings and parking space, and the traffic patterns are not good. (A. 155).

The growth in the area is in the suburbs of Phillipsburg and other areas of Warren, Northampton and Lehigh Counties. (A. 261-262; 155; R. 281-282). The growth areas in Warren County are to the northwest from Phillipsburg including Harmony, Lopatcong, Greenwich and White Townships, and to the southeast including Pohatong, Bloomsburg and northwest Hunterdon County, N. J. (A. 261-262). A residential complex is commencing north of Hackettstown, and growth is expected in the Belvidere area, both towns are in Warren County. (R. 335-337). The area growth is visible when one travels by car from Washington, N. J. to Allentown, Pennsylvania. One can see growth in new industrial plants and a decrease in farm lands and vacant lots. (R. 282; 375). The growth already taken place and the anticipated growth in the next few years in Warren County is expected to increase primarily because of industry coming into the area and the two new highways, Interstate Routes 78 and 80. (A. 335-336; 410-411; R. 1025-1026). There has been fairly rapid commercial and industrial growth throughout the Warren and Hunterdon County area. (R. 1023; A. 340)

The general area has grown industrially in the last 5 years with new plants having been built by such concerns as IT&T, Fairmont-Lavalle, S&I Handling Systems and Lavalette Corp. (A. 137-138). Said area has grown through expansion and increased business of firms already in the area such as, Sun Tube Company, Hoffman-LaRoche in the Hope-Belevidere J. N. area,

Pearsall Chemical Company, Riegel Paper Company, and Nytronics, Inc. (A. 263; 336-337; 359; 387; R. 505-506). In the area are such firms as Ingersoll-Rand, Baker Chemical Company; Dixie Cup division of American Can; and Bethlehem Steel. (A. 137; R. 505). Proctor and Gamble is on the verge of building a new plant in Raritan Township near Flemington and U. S. Radium, which has started to break ground for a new plant, will be located in Beattytown which is near Hackettstown. (A. 335-336).

Product Market or Line of Commerce

Commercial banks compete for the savings dollar with other commercial banks, savings and loan associations, building and loan associations, savings bank, mutual funds, insurance company's short term certificates, commercial paper, pension funds, credit unions, and the stock market. (A. 71-72; 107-108; 158-159; 250-251; 298-300; 313-315; 317-318; 448-449; 475-476; R. 335-336; 386-387; 492; 960).

Commercial banks compete for the extension of credit with savings and loan associations, finance companies, credit unions, insurance companies, small loan companies, savings banks, and department store credit departments. (A. 72-74; 90-91; 159-160; 315-316; 361-362; 393; 449-450; 476-477).

Defendant's exhibits D1, D2 and D3 show the dollar amount and percent of the national market held by various financial institutions in the savings and lending fields. (DX-1, A. 781-2, R. 776; DX-2, A. 783-4, R. 776; DX-3, A. 787, R. 776).

Even plaintiff's expert witness, Franklin Edwards, agreed there is competition for the savings dollar be-

tween commercial banks and insurance companies' mutual funds, savings and loan associations, credit unions, stock market brokers, securities salesmen, pension funds and individual trusts. (A. 237-238; 240). Dr. Edwards also agreed there is competition for the extension of credit between commercial banks and building and loan associations, credit unions, finance companies, credit card companies such as American Express and Diners Club, department stores, insurance companies, and mutual savings banks. (A. 238-241)

Appellant's brief admits commercial banks compete with other financial institutions for the savings dollar and for the extension of credit. (Appellant's brief p. 25)

Effect of New New Jersey Banking Law

In assessing the competitive effects of this bank merger the New Jersey Banking Law must be considered. (A. 208). William B. Luklider, President, United Savings Bank, Newark, N. J., which has footings of around $242 million, (A. 446) testified that when the new New Jersey Banking Law was signed into law by the Governor, the United States Savings Bank, as well as others, will be looking throughout the First banking district for bank locations. Newark will be in the same banking district as Warren County. (A. 453-454). Chief counsel for the plaintiff admitted that if the new banking act does become law potential competition might increase very substantially in the area. (A. 454) In the argument, subsequent to the District Court's opinion, to continue the stay and open the record for supplemental evidence, counsel for plaintiff claimed he did not deny that changes had taken place in New Jersey as a result of the revised New Jersey Bank Act. (A. 575).

The new New Jersey Banking Act was signed by the Governor on January 17, 1969, and became effective six months later, July 17, 1969. (N. J. Stat. Ann. § 17.9A-19(F) (Supp. 1969). The new act retains the home office protection proviso with respect to *de novo* branching, while merger is permitted in any area. (N. J. Stat. Ann. § 17.9A-19(B)(3) (Supp. 1969). Under the new act, the State of New Jersey is subdivided into three banking districts. District-wide merger is permitted as well as *de novo* branching, excepting *de novo* branching is subject to the restraints contained in the original act (N. J. Stat. Ann. § 17.9A-19(F) and 19(B)(3) (Supp. 1969); so admitted in appellant's jurisdictional statement (p. 9).

The first banking district is a seven-county district which includes Warren, Hudson, Essex, Passaic, Morris, Sussex and Bergen Counties. Not only are commercial banks permitted to merge and branch district-wide, but so also are savings banks and building and loan associations. (N. J. Stat. Ann. § 17.9A-19, Supp. 1969. N. J. Stat. Ann. § 17.12B-26). The first banking district is the most populous in the state. (1960 Census of Population, Vol. 1, pp. 32-13 to 32-15). The largest banks in the state are located in this district, (IX-30 A. 868-70, A. 581; American Bank Directory Fall Ed. 1969, pp. 2095-2177) such as, First National State Bank of New Jersey, with deposits of $659,591,000; Fidelity Union Trust Company, with deposits of $619,613,000; National Newark and Essex Bank, with deposits of $579,860,000; Peoples Trust of New Jersey, with deposits of $502,531,000; and New Jersey Bank, with deposits of $438,105,000. Within the first banking district, as of June 30, 1969, Phillipsburg National ranks 44th with .37 percent of the total

deposits and second National ranks 58th with .24 percent of the total deposits; combined, these two banks would rank 26th with about six tenths of one per cent of total deposits, or .61 percent of total deposits. (IX-30, A. 868-70, A. 581).

Before the passage of the new act in 1968, there were 22 applications for branches in the counties making up the first banking district; in the first nine months of 1969, after the passage of the act, there were 119 branch applications. Already, large and substantial banks have begun to move into the various counties in the first district either by merger or branching. The National Newark and Essex Bank, third largest in the district, headquartered in Newark and holding total deposits of over $579 million has obtained approval of a merger in Warren County with Washington Trust Company, Washington, New Jersey. Washington Trust has deposits of $16 million and offices in Oxford and White Townships. Peoples Trust Company of New Jersey, fourth largest in the district, headquartered in Hackensack and holding deposits of over $502 million has filed an application to merge in Warren County with Peoples National Bank of Hackettstown, a bank with $19 million in deposits. Also, Trust Company National Bank of Morristown, New Jersey, the eleventh ranked bank with deposits over $166 million, has applied for a branch in Warren County in Harrison Township. (A. 572-573; IX-30, A. 866-78, A. 581).

When the Department of Justice submitted its report to the Comptroller of the Currency with regard to the proposed merger of the Washington Trust Company into the National Newark and Essex Bank, Newark, New Jersey, the Justice Department fully

recognized the significant changes which the new law had produced and stated the merger would not have any significant effect on existing and potential competition. It clearly stated that "the recent broadening of the geographic boundaries of permissible branch office operations by commercial banks in New Jersey has induced substantial market activity both by *de novo* branching and by merger." The competitive report stated in conclusion (p. 4) "Therefore, this acquisition of one of the smallest banks in the First Banking District does not seem likely to have a significantly adverse effect on potential competition." (IX-30, A. 880-3, A. 581) (pp. 3-4 of Justice Report). The competitive report by the Board of Governors of the Federal Reserve Board (p. 2) on the same merger also recognized the changes which the new law had produced and reached the conclusion the merger would have no adverse competitive effects. (IX-30, A. 876-7, A. 581).

Competitive Effects

The merger will have no harmful effects on any bank or anyone in the community. (R. 160-161 Riciardi deposition). There will be no meaningful or measurable anticompetitive effect from this merger because of the ease of entry into the banking business as well as the savings and loan business and the mutual savings bank business. (A. 503; DX-10, A. 800, R. 776). Although plaintiff's expert witness's study suggested harmful effects indicating that after a merger the rate paid on savings deposits, deposits decreased and the interest rate for loans increased, the overwhelming experience of other witnesses, practically all bankers, has been the rates paid on savings either increased or remained unchanged and the interest rate

for loans remained unchanged. (A. 379-380; 387; 394; 447-448; 461; 477-478; 504). Although participating in prior mergers, no such witness knew of any instance where a merger has led to higher interest rates on loans to small businessmen. (A. 379-380; 387; 394; 448; 461). Plaintiff's expert witness agreed that economists differ over whether his study that higher concentration could result in higher loan rate is true (A. 232-233). Rates of interest paid on time and savings deposits by banks in the $25 to $50 million group are higher than the rate paid by smaller banks and the interest charges on loans are less.

Phillipsburg National and Second National have not been aggressive in the past because of their size and capital structure and their merger will not be eliminating a significant competitive factor. (A. 547-548). The merger is pro-competitive in that it will add a new and significant competitor and create a bank with the ability and specialists to furnish services it was unable to supply in the past. (A. 502-503). An Easton banker testified the merger specifically will intensify competition between Phillipsburg and Easton banks and eliminate the existing apathy in banking competition in the area. He added the merger would benefit the public by increasing and intensifying competition generally in the area. (A. 391). Another banker in Hunterdon County testified the merger would be pro-competitive and result in better and tougher competition in the area. (A. 477). Still another banker testified the merger would be pro-competitive and benefit the community with new and younger personnel and expanded services. (A. 461-462).

No trend toward banking concentration can be found in the geographic area and neither Phillipsburg nor

Second National have been involved in prior mergers. (DX-10, A. 800, R. 776). The concentration of bank deposits in the commercial banks in the Allentown-Bethlehem-Easton standard metropolitan statistical area as of June 30, 1966 was extremely low. (A. 501; 502; DX-8, A. 794-6, R. 776). The percentage share of the largest, the three largest and the five largest commercial banks in said area will not be changed after the merger. (A. 502; DX-8, A. 794, R. 776).

Concentration ratios by themselves are meaningless and unreliable. Concentration ratios in and of themselves show nothing as to the types of competitors or the effect on competitors after a merger. Concentration ratios must be considered together with the structure of the market and the appropriate or relevant product market. Concentration ratios may be helpful in conjunction with other data in increasing our understanding of competition. (A. 522-523; 548).

The Allentown-Bethlehem-Easton standard metropolitan statistical area concentration ratio is low and in fact one of the lowest in the 50 or 60 SMSAs where branch banking is legal. (A. 501; DX-8, A. 994-7, R. 776).

Convenience and Needs Management and Personnel Problems

The ages of the top management at both banks to this merger is above normal retirement age. Mr. Curry, President of Phillipsburg National is 71, Mr. Pursel who is President of Second National is 80, and Mr. Lester Pursell who is executive vice president of Second National is over 70 years of age. (A. 264; 324; 664).

The President of Second National is 80 years old and would like to retire. (A. 660).

Although Mr. Pursel thinks Lester Pursell could take over the reins as President if Mr. Pursel retires, Lester Pursell does not want the job, as he is 70 years old, and he too wants to retire. (A. 660; 664).

The president and chief executive officer of Phillipsburg National is 71 years of age and anxious to retire and the Executive Officer is 59 years old going on 60. (A. 264; 324).

Advanced age of bank management has an adverse influence on the competence of that management. Compulsory retirement age at First National Bank in Bethlehem is 65 years of age. (A. 110; R. 390-391). The growth rate of a bank depends on the caliber of its management. (R. 1455-1456).

A Newark, New Jersey correspondent banker was consulted by Second National in 1965 seeking advice about its condition. The banker recommended to the Board of Directors of Second National, after studying problems, that Second National needed three new men, one for trusts, one for mortgages, and one for general operations in the bank. (A. 151-153).

Second National presently is in desperate need of younger men to replace the aging management. (A. 442; 660-661). Phillipsburg National needs more personnel but it has been unable to develop it within its own ranks. (A. 649).

As a bank grows it becomes essential to hire specialists. Small banks do not grow personnel-wise from within the bank, in the few cases it was tried the results were inadequate; hence, the constant search for talent on the college campus, although many small banks are precluded because of the high demands of the graduate. (A. 384-385). An assistant vice-presi-

dent of the First Pennsylvania Bank and Trust Company, the largest bank in Philadelphia, testified that he is his bank's representative for correspondent banks and deals with 70 to 80 such New Jersey correspondent banks who are constantly calling him seeking bank personnel. (R. 1443-1445). Salary scale is important and if a bank wants competent personnel it must be willing to pay proper salaries. (A. 105).

The starting salary expected by prospective college graduates without banking experience is from $7,500 to $8,500. The prospective employee with graduate school training or banking background expects from $11,000 to $15,000 per year. (A. 474; 506-507).

Second National was advised in 1965 by its correspondent banker, whose help it sought, that it could expect to have to pay a yearly salary to a mortgage officer in the range of $9,000 to $14,000; to a general operations officer approximately $10,000 to $14,000; and to a trust officer about $14,000 to $15,000. However, as of the time of trial of this case in the District Court the salary ranges had increased so that the mortgage officer would receive about $15,000; the general operations officer about $16,000; and the trust officer about $18,000 (A. 151-152).

The Assistant Vice President of First Pennsylvania Bank and Trust Company stated the salary scale for a trust officer is $18,000 to $22,000; for a commercial and industrial loan specialist is $18,000 to $20,000; and for a mortgage specialist about $16,000. (A. 537).

Trust Needs

The President of the First National Bank and Trust Co. of Bethlehem, which bank had assets of $115,327,000, testified the yearly salary range for a

competent trust officer would be $15,000 to $20,000 and an experienced commercial lending officer's yearly salary would be $20,000 to $25,000. (A. 112-113).

The salary scale at Phillipsburg National compared with banks of the same size is in most instances very much below the scale. (A. 645). The salary scale for presidents of banks with total assets of $30 million to $50 million $25,000 to $30,000 a year. (A. 536).

Phillipsburg National principal employees received the following salaries, including bonus, for 1967:

President	$19,134
Cashier	12,371
Assistant Trust Officer	9,410
Consumer Loan Officer	9,010
Assistant Cashier	8,830
Two other assistant cashiers	6,950 ea.
One other assistant cashier	6,362

(IX-28, A. 864-5, R. 1439).

Second National's principal employees received the following salaries, including bonuses, for 1967:

President	$11,544
Exec. Vice President	12,563
Cashier	9,346

The five other officers received salaries and bonuses totaling a low of $5,379 to a high of $9,159 (IX-28 A. 864-5, R. 1439).

Neither Phillipsburg National or Second National have a full-time trust officer. Neither can afford to hire a full-time trust officer. (A. 325; 655; R. 240-241 Curry deposition). At present there is no full-

time trust officer in Warren County. (A. 281). Second National's trust department is so small it would be ridiculous to consider hiring a full-time trust officer. (A. 657). Its trust assets amount to $125,000. (IX-5, A. 840, 850, R. 1438). A trust department embarking on a full scale program needs 7 to 8 years before it breaks even. (A. 112-113; 162-163) and usually requires $25 to $30 million in personal trusts to break even. (A. 112-113). It would cost $100,000 to operate a trust department properly. (A. 111-112).

A bank cannot have an aggressive trust department without a full-time trust officer. (A. 92; R. 394). Phillipsburg National's trust activity is limited because it doesn't have a full-time trust officer to develop it. (A. 632). Its total trust assets amount to $2,331,000. (IX-5, A. 840, 849, R. 1438). Trust business will not grow unless a bank solicits such business and at present Phillipsburg National does not solicit trust business and has an antiquated trust department. (A. 166; 265). You can't find a competent trust officer to run a $2 million department. (R. 876).

Bankers and businessmen testified there is a demand for trust business in the area. (A. 291; 354; 358; 374-375; 390; 539-540; 654; 265; R. 1306-1307). There is a need existing in Warren County to service trust accounts and pension trusts. (A. 60; 655). A number of businessmen testified there was a need in the area for a full-time trust officer to handle company pension funds. (A. 329-330; 354; 358; 439; 486). Several business executives testified if a full-time trust officer was available, their company trust funds would be turned over to the merged bank. (A. 358; 374-375; 486; 491). As proof of existing trust business the Philadelphia banks are actively seeking such business in the area. (A. 106).

Commercial and Industrial Lending Needs

At present no Warren County bank has a commercial and industrial (hereinafter referred to as C & I) specialist. (A. 331-332; R. 880). There is an increasing demand for C & I loans in the area. (A. 631). The expansion and influx of industry into the area has increased the need for more C & I loans. (A. 267; 329; 337; 539). The industrial growth in Warren County as well as the anticipated growth demonstrate the need for a full-time C & I specialist. (A. 639-641; R. 169-171 Daubert deposition).

The proper handling of C & I loans requires a specialist in the field who must be able to give advice to business on how to conduct their business and he should be able to personally call on the business establishments. (R. 393). If a C & I loan specialist had been available for business advice at the Phillipsburg bank McGenley Mills would have been able to acquire another company. (A. 331-332).

The hiring of a C & I loan specialist by these banks separately is not possible at the present time because of salary and insufficient business as individual banks. (A. 279; 639; 640-641; R. 260 L. Pursell deposition; R. 174 Daubert deposition). The Executive Vice President of Second National does not see how his bank can be a factor in the C & I lending field without the merger, as the bank needs a C & I specialist and it cannot hire one without the merger. (A. 656-657).

Need for Mortgage Specialist

Both Phillipsburg National and Second National need a mortgage specialist. (A. 267-268; 462). Phillipsburg National cannot afford to hire a mortgage specialist without a merger. (A. 639).

Phillipsburg National needs a mortgage loan officer that has been trained in appraisals and developing mortgage loans and to handle the entire portfolio thereby relieving the bank directors from making property appraisals. After the merger, a full-time mortgage officer could do all this for the resultant bank. (A. 639).

Higher Lending Limit Need

The lending limits of Phillipsburg National and Second National for the year 1967 were $120,326 and $131,468, respectively. The lending limit of the resultant bank after merger will be approximately $250,000. (GX-6, A. 712-3, R. 85).

The lending limit at Phillipsburg National has posed a serious competitive handicap to the bank and a number of accounts have been lost because of the inability of the bank to lend larger sums of money. (A. 637-638). Even though most borrowers know, without asking, what a bank's lending limit is and therefore never make an application for a loan over such lending limit. (R. 258 L. Pursell deposition). Nevertheless, Phillipsburg National has about 25 requests per year and Second National 10 to 12 requests per year for loans that exceed their lending limits (A. 638; R. 166 Daubert deposition).

While it is possible to participate many loans, some borrowers prefer not to participate and would rather get all their credit from one source. (A. 444; 488-489). Loan participations are objectionable because the borrower is required to establish his credit standing and worthiness to a second and a third banker who is unknown, and there is additional inconvenient paperwork. It is inconvenient to be dependent for such

banking services on more than one bank. (R. 163-164 Ricciardi deposition).

Furman Denton, Executive Vice President of First National State Bank of New Jersey, with deposits as of June 30, 1969 of $659,591,000, headquartered in Newark, testified that participations have the potential disadvantage of losing the customer to the larger city correspondent bank. Also, participating loans with a larger bank is not always feasible as the larger city correspondents may not have the funds available because of other credit needs. He stated he knew of instances where his bank refused to participate in a loan to customers of smaller correspondent banks. (A. 382-383; R. 1126).

A Phillipsburg appliance store reached the lending limit at Phillipsburg National and was compelled to borrow at First Pennsylvania Bank and Trust Company in Philadelphia, although the customers preferred to bank locally. (A. 428-429). A textile manufacturing concern located in Phillipsburg borrowed $600,000 from Philadelphia National Bank because the local banks couldn't handle this large a loan. (A. 333). The former mayor of Phillipsburg testified he tried unsuccessfully to get a motel loan of $250,000 at the Phillipsburg banks. (A. 433). An Alpha, New Jersey, tool manufacturer testified a larger bank would help his company because his loan requirements are higher than Phillipsburg National or Second National separately can handle. (A. 353).

Both Phillipsburg National and Second National are unable because of their small lending limits to floor plan automobiles. (A. 476-477). The Phillipsburg Ford automobile dealer tried to get a $150,000 line of credit from Phillipsburg National for floor

planning of cars but it was over the bank's lending limit. (A. 418). The increased lending limit resulting from the merger will allow the resultant bank to floor plan at least three automobile dealers in the area. (A. 412-413; 445-446).

A Phillipsburg contractor has a line of credit at Phillipsburg National Bank of $115,000 but his needs are for more and the resultant bank will increase his line of credit to $250,000. (A. 323; 324). Orr's Department Store and also a Phillipsburg chemical manufacturer both prefer to do their banking locally because of convenience. Both will have need of credit in the several hundred thousand dollar range, the resultant bank would be of great aid to them. (A. 375; 358-360).

Other small businessmen testified that the increased lending limit of the resultant bank would help them. (A. 276-277; 290; 387; 486-487).

The community would be benefited as a result of the merger because larger borrowers would be able to get their credit requirements satisfied in Phillipsburg rather than going to New York, Philadelphia or elsewhere. The local bank will be serving local customers, otherwise the loans and correspondent deposits would flow outside of Phillipsburg to the benefit of other cities. (A. 529).

There is a demand in the area for higher lines of credit and for higher lending limits. Phillipsburg National has been restricted in loans. (A. 248-250). To small banks the size of Phillipsburg National and Second National who wish to build C & I loan business, lending limits are very important. (A-111).

The merger will increase the lending limit of the bank and this will be beneficial for the area. (A. 157).

Merger Necessary for Banks To Grow and for Their Ability To Serve

The only possible way to grow in Phillipsburg is by merger not by internal expansion. (A. 443). The growth of Second National and Phillipsburg, without the merger, will be limited to the possible growth in the economy (A. 540; R. 133-134 Casteline deposition) and not by reaching out, for the development of business. (R. 133-134 Casteline deposition). Both the President and the Executive Vice President of Second National stated the growth at their bank has leveled off. (R. 9-10 H. Pursell deposition; R. 225 L. Pursell deposition).

If a bank is to actively grow and seek out C & I loans and be a commercial force for the good of the community, it must have skilled technicians or specialists who can call on businesses and offer business advice and banking services, which businessmen expect. (A. 655; R. 1455-1456). Neither Phillipsburg National or Second National has a man on the road conducting a call or soliciting any type of business. But after the merger, the resultant bank could. (R. 209, 211 Curry deposition; R. 259 L. Pursell deposition; R. 163 Daubert deposition).

A $40 million bank can serve its community better than an $18 million bank as it has more services available in a wider geographic area and it can acquire better qualified personnel. (R. 131-132 Casteline deposition). A larger bank can do more for the community in the way of civic projects such as the Board of Education, hospital boards of trustees and municipal government. (R. 1307-1308). Larger banks ($25 to $50 million) provide more in credit services than do smaller banks. (A. 546).

C & I lending is vital to the community service it not only directly benefits the borrowing company in expansion but also provides employment in the community. (R. 1470-1471).

Additional advantages in serving the convenience and needs of the community will stem from the economics of resale that will result from the merger. For three types of loans, namely, real estate, consumer, and C & I loans plus time and demand deposits, after merger there should be $22,000 savings or reductions per year and $50,000 cost savings or reductions in operating cost after the merger. Such savings could be invested in branches, for expansion after the merger. (A. 505-506).

While it is not feasible for these banks to open additional branches separately, after merger the resultant bank can open branches. (A. 173; 441-442; 484). The Board of Directors of Second National have given no thought to opening a new branch, the bank cannot afford to open a new one, but if it merged the resultant bank would be in a much better position to branch. (R. 17 H. Pursell deposition; R. 277 L. Pursell deposition; R. 176 Daubert deposition)

Both Phillipsburg National and Second National need more capital. (A. 156-157; 171; 173-174). Second National's ability to compete for commercial accounts has been limited because of capital deficiency. (R. 117 Daubert deposition). Because of the capital structure at Phillipsburg National it cannot afford to hire new personnel. (R. 247 Curry deposition). After the merger the resultant bank will be better able to attract capital and it plans to add additional capital. (A. 156; 367).

The merger will aid local businessmen by making available more services and the resultant bank will

have more capacity in lending area and in giving business advice. (A. 359-360; 620). A large bank would provide more convenient branches and more services to the area. (R. 160-161 Ricciardi deposition).

After the trust officer is hired he can assist in directing the investment portfolio policy of the resultant bank. (A. 165-166). A C & I loan specialist would be able to correct the credit files which in small banks leaves must to be desired. (A. 392). Such C & I loan offices, after the merger, would endeavor to seek ways and means of making loans, and creating a source of credit for worthwhile and economic endeavors, thereby advancing the economic enterprises in the area served by the bank. (A. 381).

Attempts to Recruit

The President of Hunterdon County National Bank, with assets of about $60 million, testified that he went out to universities to recruit. He talks to about 200 people each year to get three or four. It takes forty interviews to get one man worth bringing home. (A. 474). William Greenly, Senior Vice President of Fideltiy Union Trust Company, Newark, New Jersey, who was asked by Second National to help them get some competent personnel pointed out to the Board of Directors the difficulty in obtaining personnel, as well as the problem of internal friction and jealousy created by bringing in high-paid personnel. (A. 153). For over a year attempts were made to find personnel to fill management positions at Second National but those who came to Mr. Greenley's attention were "duds that weren't getting along somewhere else," or their personality defects were such it was obvious they wouldn't work out. (A. 153-154).

Mr. Greenley did not specifically put Second National in touch with any potential employees to fill management positions because none of the people he spoke with who were capable were interested in Phillipsburg. An Assistant Vice President at Fidelity Bank in Newark, a Mr. Wilson, rode to Phillipsburg with Mr. Greenley on several occassions and looked the bank over but showed no interest even though he was told the salary range was to be $20,000. (A. 169-170).

A Thomas Armstrong, a Director of Second National for fifteen years, spoke to a Robert Van Buren, a Vice President of Chemical Bank of New York during July 1967 about coming to work for Second National, and also whether he could suggest anyone, but to no avail. Mr. Van Buren wanted a salary in excess of $30,000 per year, plus other committments. (A. 406-407). Mr. Armstrong stated Mr. Seiss, another director, had attempted to attract people and continues to do so. Other members of the Board of Directors have spoken to prospective management candidates, but have been unsuccessful. (A. 406).

Phillipsburg National presently needs more personnel but has been unable to develop or procure it. The President of the bank testified he had not gone out and tried to fill the management gaps as he knows the salaries this replacement personnel are asking and he knows the bank cannot afford to pay such salaries. (A. 649-650). A director of Phillipsburg National testified the President wants to retire and the Directors have had almost weekly discussions on how and where they could find a successor. (R. 988-989). Efforts have been made by Phillipsburg National to obtain competent executives but without success. (A. 264; R. 988-989).

Merger Is the Only Answer

Having no success in recruiting personnel Mr. Greenley suggested that a merger with Phillipsburg National would solve the problems of Second National. (A. 154). Separately these two banks could not afford to hire necessary personnel. (A. 538-539; R. 1306; R. 134 Casteline deposition). They must compete with banks in larger cities for managerial talent. (A. 538-539; R. 1452-1453). The minimum size to be able to hire a C & I loan specialist, a mortgage specialist and a trust specialist would be a bank of between $35 and $40 million. (A. 537-538).

A large bank is better able to attract and afford competent personnel. (A. 92; 142-143; 164-165). Aggressive management cannot be found for these small banks separately even if the entire net earnings of each bank were paid out in salaries. (A. 483).

The merger is essential in order to attract competent personnel and pay the appropriate salaries to replace the older management. (A. 405-406).

A larger bank has less difficulty in attracting new talent and the chances of getting the talent are increased because they can pay the salaries, give fringe benefits and more opportunity for advancement. (A. 164-165; 155-156; 284, 330; 382; 391-392). If the merger is allowed, a C & I loan officer, mortgage officer and a trust officer will be hired by the resultant bank. (A. 285).

Future Prospects

The future prospects of the Phillipsburg National and Second National are not bright as neither can "make it" without a merger. (A. 483; 384). Small banks without continuity of management of younger men are in trouble. The future prospects of these

two banks separately, caused the President of an Allentown bank to testify that he would be "real worried" about their future. (R. 133-134 Casteline deposition).

The future of these two small banks is glum because of the problems of personnel and competition. Generally the future of the small bank is rather glum, because of the problems of automation, personnel, of other facilities and competition. It is not unusual to find authorities in the field of banking pointing this out, that there is a need for growth and that the small bank would reach a position where it is no longer competitive and would be forced to consider some way of fortifying its competitive position. This merger would do just that. (A. 384; 506).

If the merger does not go through, these small banks will not be able to properly service the people and business in the area. Phillipsburg National cannot presently keep pace with the economic growth in the area without a merger. (A. 650).

The immediate problem facing these two small banks is to become large enough to effectively compete with the competition they are presently faced with and with the banking requirements of the business in the area and moving into the area. (A. 540-541).

In view of the amendments to the New Jersey banking statute, which will permit the Newark banks—the largest in the state—to merge and branch in Warren County, these large banks and others in the first banking district have become actual competitors of Phillipsburg National and Second National. (N.J. Stat. Ann. § 17; 911-19, Supp. 1969) (IX-30, A. 866-78, A. 581).

ARGUMENT

Distinguishing Characteristics of the Proposed Merger

Before proceeding to the questions presented by Appellant, this case should first be put in proper perspective in relation to the other contested Section 7 cases, which have attempted to delineate the ruling law for bank merger cases. The Section 7 bank merger cases contested prior to this action were all cases involving large commercial banks located in urban areas abounding with business and industry. Such banks' trust departments were among the country's largest. The demand deposits of said banks ranged from over $5 billion to approximately $340 million. Mortgages on residences and farms were small compared to the commercial and industrial business done by these banks.

The banks involved in the instant case are located in a small town emerging from a rural status. Banking customs are quite different. Customers of these rural banks live many miles from banks and travel good distances to do their banking and financing. These banks have been serving the area by accepting deposits and lending money primarily to finance residences. The commercial and industrial business done by these banks is insignificant when compared to their total business, and to commercial and industrial business done by the large commercial banks mentioned above. The demand deposits are comparatively small while savings deposits represent the bulk of the deposits of these banks. As for size, these two banks combined would have deposits of $38,362,828, while the largest combined banks of the contested cases mentioned above would have $5,189,774,639 and the smallest $336,415,959.

Concentration and restraints of trade in large urban areas with billion dollar banks or at the minimum banks with approximately a half billion dollars in assets must be viewed differently than two banks whose combined assets would be $41.1 million (IX-1, A. 831, R. 1438) and serving a former rural county which has only small country banks. Even though the County is growing commercially and industrially, the local banks are so small they cannot compete aggressively or serve the growing county. Business is compelled to go out of the county and state for adequate financing, trust facilities, business advice, and the many other needed services that should be supplied by the local banks.

Such an approach is consistent with the Supreme Court's statement in *United States* v. *Continental Can Co.,* 378 U.S. 441, 458, (1964) that "a judgment under Section 7 is not to be made by any single qualitative or quantitative test," and that "the merger must be viewed functionally in the context of the particular market involved, its structure, history, and probable future." See also *United States* v. *Crocker-Anglo National Bank et al.,* 277 F.Supp. 133, 157-168, 199 (U.S. D.C. N.D. Calif. 1967). The courts have held that while statistics reflecting market control are important, there must be a further examination of the market involved, including its structure, history, and probable future, in order to provide the appropriate setting for judging the probable effect of a merger. *Brown Shoe* v. *United States,* 370 U.S. 294, 322 (1962). *United States* v. *Jerold Electronics Corp.,* 187 F.Supp. 545 (D.C. E.D. Pa.) aff'd, 365 U.S. 567. In a very recent decision *United States* v. *Tidewater Marine Service Inc., et al.,* 284 F.Supp. 324 (D.C. E.D. La. April 1968) the court said at page 341: "Bigness alone is not the evil. The Clayton Act's purpose is to thwart

mergers which tend to stifle competition, and to foster competition when it is needed. For these reasons, market shares, while undeniably important, do not tell the whole story. The law is geared to economics, not mathematics. The core question of the merger's probable effects on competition must be examined in light of all the pertinent economic factors of the particular market."

That this case is different from the prior litigated cases is clear from statements made in *United States* v. *Philadelphia National Bank, et. al.*, 374 U.S. 321, 370-371 (1963). When the Court turned to the justifications advanced by the defendant banks, it said the banks do not contend they are unable to expand without the merger. However, in the instant case Phillipsburg National and Second National do so contend. In *Philadelphia National* the Supreme Court said that it was not a case where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in the market. However, Phillipsburg National and Second National are indeed two small banks desiring to merge to be better able to compete in the market place.[6] In *Philadelphia Na-*

[6] Legislation recently enacted by the Senate and General Assembly of the State of New Jersey will permit the large banks in Newark to branch into Warren County. The merger of Phillipsburg National and Second National would seem a must in order to compete with such potential competition.

In *Brown Shoe Co.* v. *United States*, 370 U.S. at 294 the Court said:

> . . . Congress foresaw that the merger of two large companies or a large and a small company might violate the Clayton Act *while the merger of two small companies might not, although the share of the market foreclosed be identical, if the purpose of the small companies is to compete with larger corporations dominating the market.* (*Emphasis supplied*)

tional the Supreme Court said that it was not a case in which lack of adequate banking facilities were causing hardships to individuals or businesses in the community. However, it is strongly contended in the instant case that lack of adequate banking facilities are causing hardships both to individuals and businesses in the community.

In *Philadelphia National* the Supreme Court stated further, among other things, that it was not a case where the banks were undercapitalized; or where management was a problem; or where ruinous competition was in the offing. However, in the instant case, the two defendant banks do need capitalization to move forward; there are serious management problems, especially so with Second National. These banks individually will be unable to be effective competitors and unable to serve their community. There are serious doubts these banks will be able to make a go of it in today's market.

In addition, the legislation recently passed by the Senate and General Assembly of the State of New Jersey, permitting merging and branch banking in three defined banking districts as opposed to county only, brings competition that will be ruinous to Phillipsburg National and Second National if they should remain separate entities. These two small banks are now in the first banking district, a seven county district, in which the largest banks in the state are located. Four of these large banks have deposits in excess of $500,000,000. In the first banking district, Phillipsburg National ranks 44th with .37% of total district deposits, and Second National ranks 58th with .24% total district deposits. (IX-30, A. 868-70, A. 581).

Since one of the purposes of the antitrust laws is to foster competition where needed, it is obvious that more competition and more and better services are needed in Warren County, the first banking district and the geographic area selected by the District Court. The record is replete with needs in the area for trust services, commercial and industrial lending, larger lending limits, business advice, etc. These two banks cannot and will never be able to compete in the area and especially in the new first banking district, unless they can grow. This merger is their answer to start to grow and give aggressive competition to the large banks now moving in and to supply desperately needed services. The only other answer for these two banks separately is to eventually merge with the large Newark banks, which banks will only get larger and absorb more of the State's banking resources. A merger of these two banks will be a real step toward competition, and better services. This certainly is the aim of the antitrust laws.

Product Market or Line of Commerce

Responding to Appellant's first question, the District Court did not erroneously reject commercial banking as a relevant product market or line of commerce. Instead it followed a series of cases not appealed by appellant, which have rejected commercial banking as a separate and distinct line of commerce. *United States* v. *Crocker-Anglo National Bank, et al.* 277 F. Supp. 133 (D.C. N.D. Cal. 1967), which was decided by a three judge District Court; *United States* v. *Provident National Bank*, et al. 280 F. Supp. 1, (D.C. E.D. Pa. 1968), *United States* v. *First National Bank of Jackson* et al., 301 F. Supp. 1161 (D.C. S.D. Miss. 1969); and *United States* v. *First National Bank of Maryland* et al., 1970 Trade Cases Par. 73061.

Since the passage of the Bank Merger Act of 1966, 12 U.S.C. 1828(c), this question was raised before the Supreme Court on appeal of *United States* v. *First City National Bank,* et al. 386 U.S. 361 (1967) and was specifically left open. Also, in *United States* v. *Third National Bank in Nashville,* 390 U.S. 171 (1968) where commercial banking merely was mentioned in a footnote (p. 182).

However, the three judge District Court in deciding *United States* v. *Crocker-Anglo National Bank,* 277 F. Supp. 133 (D.C. N.D. Cal. 1967) stated (p. 153-4) it was their opinion that "commercial banking" was not the sole line of commerce to be considered. The court should consider the totality of financial activities carried on by commercial banks and their competition. After discussing the omission of the phrase "line of commerce" from BMA-66 (U.S.C. § 1828(c)(5)(b)) and the comments made by the legislators during the considerations and passage of said Act, the three judge court stated on page 157:

> "The court having concluded that the intent of Congress in deleting the phrase "line of commerce" from the Bank Merger Act of 1966 was to permit an assessment of the competitive effect of a merger, not in the narrow market consisting solely of commercial banks, but in the wider and more realistic field of all institutions which compete either for the savings or investment dollar or for the extension of credit, now reviews this wider field."

The court in *Crocker* considered such other financial institutions as savings and loan associations; finance companies; both small loan and automobile loan companies, credit unions; the Division of Farm and Home

Purchases of The California Department of Veterans Affairs; insurance companies; the numerous offices of the Morris Plan Company; U.S. Savings Bonds; Postal Savings; Mutual Funds; Government Securities; credit cards; other Governmental agencies and, individuals and others.

In Chief Judge Clary's opinion in *United States* v. *Provident National Bank, et al.*, 280 F. Supp. 1, (D.C. E.D. Pa. 1968) he stated (pp. 7-8) he was persuaded by Judge Zirpoli's lucid analysis of the product market in the *Crocker* case. Judge Clary extended the line of commerce to include mutual savings banks, which were quite large in Philadelphia, and savings and loan institutions in considering competition for the dollar. He did not consider finance companies as competitors because they derived much of their lendable funds from commercial banks. Intervenor does not agree with this conclusion of the court, especially in view of the fact the important finance companies today get practically all their borrowed funds from commercial paper.

There is ample evidence in the record of this case to prove competition with commercial banks for the savings dollar by savings and loan institutions; mutual funds; pension plans; Government securities and bonds; insurance companies; stockbrokers; corporate bonds and notes; and, credit unions. On the credit or loan side there is ample evidence to prove competition by savings and loan associations; mutual savings banks; life insurance companies; small loan companies; automobile finance companies; credit unions; and Government agencies in the mortgage field. Also there has been shown to be substantial competition from Philadelphia and Newark banks in both the savings and lending areas as well as in trust business.

Not only did the Intervenor and defendant banks witnesses supply a wealth of evidence to support the contention that other financial institutions and commercial banks competed for the same customers, but *plaintiff's own witnesses admitted such competition.*

The Appellant contends that the demand deposit—unique to commercial banks[7] insofar as it is the principal medium for the transfer of funds—so insulates these principal functions of commercial banks from the normal effects of competition that we may consider all of these items as one big line of commerce in a geographic market associated with any of them largely independent in all their ramifications from any non-commercial bank competition. We believe that this proposition is, demonstrably, arrant nonsense. The transfer function is, we concede, relatively unique and warrants treatment as a separate line of commerce. But only in this single respect may we examine the competitive effects of a proposed bank merger in isolation from other financial institutions. The effect of the proposed merger on the nature, kind and quality of competition in transferring funds is all we concede is insulated. If examination proves this kind of activity to be relatively non-competitive, relatively immune to effects of change in the number of suppliers, then the effects of the merger *in that line of commerce* must be measured by different standards than would govern something more volatile like the market for savings dollars. There, of course, the universe (the total num-

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[7] Demand deposits are unique to commercial banks generally speaking, but in New Jersey Savings Banks can and do accept demand deposits. This is also true in the State of Maryland. In other States Savings Banks and Savings & Loan Associations are pushing for legislation to permit them to accept demand deposits.

ber of competitors) is much larger than commercial banks alone and the effect of the merger must be measured in that greater context.

To say commercial banks and its various functions obtain the status of uniqueness because the accept demand deposits would give a result of "the tail wagging the dog."

Appellant also contends commerical banks are unique because they create money through demand deposits. A commercial bank while it gives credit because of a deposit cannot by itself increase the money supply. This can only happen with the aid of the whole banking system.[8]

The creation of money *per se* does not give commercial banks a competitive advantage in any of the product and service markets in which they compete. Commercial banks can create money only by making loans. In the search for credit worthy borrowers they face competition from a wide variety of other financial institutions such as other commercial banks, mutual savings banks, savings and loan associations, credit unions, sales finance companies, insurance, the substantial government credit agencies and so forth. Hence, even if commercial banks in New Jersey were unique, that particular uniqueness would be irrelevant in the assessment of the competitive effects of the merger.

The primary function of a bank is to receive money and to extend credit. It receives money for safekeeping and for savings, a form of investment, and lends money to borrowers. It is organized to serve the public

[8] Economics, An Introductory Analysis, by Paul A. Samuelson, Professor of Economics, Massachusetts Institute of Technology, 1958, Fourth Ed.

and to make a profit. It is not organized for the purpose of creating money, this is an indirect result, aided by the banking system as a whole, of lending money deposited at a bank. This creation of money has nothing to do with competition or more specifically the competitive effect of this merger. Nor does it make all functions of the bank unique. These functions are separate and distinct from the creation of money.

Appellant places much reliance upon the unique congeries of services offered by commercial banks. Appellee Intervenor denies the relevance of any representation that no other financial institution duplicates the precise combination of services offered by commercial banks. In the science of semantics, words are meant to differentiate, to particularize concepts. If another kind of financial institution offered the same congeries of services as does a commercial bank it would not be another kind of financial institution, it would be a commercial bank. By the same token, a commercial bank is not a life insurance company because it offers a different combination of services—it is something else. But that the combinations are different does not mean that the different financial institutions do not compete in particular functions. A credit union competes with, *inter alia,* commercial banks for savings dollars and for consumer loans. This is a truth. This truth is not lessened in any way by the fact that a credit union is not a medium for the transfer of funds nor, usually, a data processing service organization. But the Clayton Act was not directed toward *combinations* of services. What *combinations* are duplicated or unduplicated are irrelevant. The Clayton Act concerns itself with *competition.* The issues in this suit relate to whether banks *compete* with other institutions in the offering of serv-

ices, service by service, and line of commerce by line of commerce.[9]

Appellee Intervenor denies that "Commercial Banking" is *the* relevant line of commerce in this case. A line of commerce, we take to mean a kind of business activity in which the products or services are functionally interchangeable—i. e., can be used for the same purpose, in which purchasers are willing to substitute one for the other. "If price changes of one product affect the sales of another, such responsiveness is indicative of the competition of the products" (*U. S.* v. *Charles Pfizer & Co.*, 246 F. Supp. 464, 468, (E.D.N.Y. 1965)). Is there "cross-elasticity of demand between products," in the words of the Supreme Court. (*U. S.* v. *E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 1956.) As the Court pointed out in *Cellophane, supra,* Plaintiff bears the burden of establishing its product market, a factual conclusion which is established neither by an *ipse dixit* in the Complaint nor by reference to fact findings in other cases. Commercial banking is not a product or a service, it is a combination of products and services, each of which forms portions of disparate lines of commerce. The competitive effect of this merger must be tested by Plaintiff in each such market and violation alleged as to that line or those lines where competition is or would be substantially lessened. It is a bootstrap operation pure and simple to say that commercial banking is unique and therefore any normal business activity—say, lending—engaged in by commercial banks is insulated from competition with other lenders.

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[9] Note, for example, the language of the Supreme Court in *United States* v. *Continental Can Company*, 347 U.S. 441.

Appellant relies exclusively on this issue upon the *Philadelphia National Bank*[10] case which was followed in *Nashville*[11] where the District Courts had found commercial banking to be the appropriate "line of commerce" and in which finding the Supreme Court concurred. The validity of the conclusion there reached on this question must be viewed in light of the fact that Chief Judge Clarey of the Eastern District of Pennsylvania who had made the initial ruling that commercial banking was a "line of commerce" in *Philadelphia*[12] took precisely the opposite view on a more complete factual record, relative to competition between commercial banks and other financial institutions, in *Provident.*[13]

In all, subsequent to the selection by the Supreme Court of "commercial banking" as a line of commerce in the *Philadelphia National Bank* case, five separate and distinguished Courts[14] have rejected this factual conclusion, all of which is in accord with the statement made by Senator Robertson, just prior to the passage of BMA-66, in response to a question by Senator Long

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[10] *United States* v. *Philadelphia National Bank et al.*, 374 U.S. 361 (1964).

[11] *United States* v. *Third National Bank in Nashville* et al., 390, U.S. 171 (1968).

[12] 201 F Supp. 348, 361 (E.D. Pa. 1962).

[13] *United States* v. *Provident National Bank*, 280 F Supp. (E.D. Pa. 1968).

[14] *U. S.* v. *Crocker-Anglo National Bank*, et al., *supra*; *U. S.* v. *Provident National Bank*, et al., *supra*; *U. S.* v. *First National Bank of Jackson*, et al., *supra*; *U. S.* v. *Phillipsburg National Bank & Trust Co.*, et al., *supra* (the case before this Court); and *U. S.* v. *First National Bank of Maryland*, et al., *supra*.

on this very question. The question and answer was as follows (112 Cong. Rec. 2-9-66, p. 2664):

> "Mr. LONG of Missouri. In determining whether a proposed merger tends to lessen competition does the bill contemplate that only competition among commercial banks is to be considered?
>
> Mr. ROBERTSON. No; that would be entirely unrealistic. At the present time the banking agencies consider as relevant the competition afforded to commercial banks by other financial institutions, for example, savings and loan associations, credit unions, insurance companies, mutual savings banks, and small loan companies. Such financial institutions compete with commercial banks and the effect of this competition must be considered by the agencies and by the courts when a proposed merger of commercial banks is being questioned."

Relevant Geographic Area

Appellant cites at length and frequently in its brief that the *Philadelphia National* case, *supra,* is controlling for judging an appropriate geographic market. In said case the Supreme Court found the appropriate geographic area to be Philadelphia and the three contiguous counties within which Philadelphia banks were permitted to branch. Such ruling, being a decision on questions of fact, is not binding on us in this case. While the rules of *stare decisis* bind us, until reversed, to the Supreme Court's legal opinion on the issue of "section of the country", "the doctrine of *stare decisis* does not ordinarily apply to decisions on questions of fact so as to render them binding in later cases, although they may be advisory." [15] In *Quon* v. *Niagara Fire Insurance Company of New York,* 190 F. 2nd 257-

[15] Corpus Juris Secundum, Courts § 212.

269 (1951), the proposition was expressed "But the judgment of fact of one court on a particular record cannot bind another court, or even the same court, to make a similar finding on a different record." Thus, Intervenor contends this court is not bound to the factual application of that conclusion under the different factual record which has been developed here in delineating the so-called "section of the country" or "trading area." However, if the court followed the ruling in *Philadelphia National, supra,* the geographical area would be much greater than that decided by the District Court.[16]

A trading area is not determined by an arbitrary selection of a geographic area most conducive to a high concentration figure. Such an area is determined by the economic realities of the market place not by mathematics. Of prime importance in selecting a geographic area is the nature of the community or area to be served. The community to be served involved in the instant case is not a highly concentrated commercial area, in an urban area, such as has been involved in other litigated cases. Normally a rural area com-

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[16] If this were the rule for this case, since the Justice Department has selected Easton & Phillipsburg and their environs as the "section of the country" then must we not also include Warren County, N.J., where Phillipsburg banks can branch and Bucks, Lehigh, Northampton, Carbon and Monroe counties in Pennsylvania where banks in Easton can branch. Such inclusion would indeed make the merger insignificant. Also, since recently enacted legislation permits banks in Warren, Essex, Bergen, Hudson, Morris, Passaic and Sussex counties to branch in each mentioned county, shouldn't all banks in these counties be included in the geographical area. (Actually, the latter area with portions of Pennsylvania selected by the District is more realistic, or even the first banking district. However, in selecting only the first banking district it is difficult not to include Easton and environs.)

posed of farmlands, residences, it is now growing as an industrial and commercial area. There are a few small urban areas readily accessible to all within the area.[17] It is an area where people will travel an approximate radius of 25 miles to work, to shop, to bank and to conduct other types of business. Such travel is made easy by today's modern mode of transportation and the many roads and super highways. It is an area where it is as normal for people to travel by car, the distances mentioned, to shop, work and bank as it is for large city dwellers to travel by public transportation or car to shop or work in confined and congested metropolitan area. Actually the time consumed to travel by car in trading areas here involved may indeed be less than that required for such travel in the large cities of our country, although the distances to be traveled may be shorter.

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[17] Intervenor, during trial, alleged two trading areas. Trading Area A and alternative Trading Area B as alternative area. Trading Area A, which conforms to defendant bank's trading area, is: all of Warren County, New Jersey, the northwestern portion of Hunterdon County, New Jersey (Alexandria Township, Bethlehem Township, Bloomsburg Borough, Clinton Town, Clinton Township, Franklin Township, Frenchtown Borough, Glen Gardner Borough, Hampton Borough, High Bridge Borough, Holland Township, Kingwood Township, Lebanon Borough, Milford Borough, Raritan Township and Union Township), all of Northampton County, Pennsylvania, all of Lehigh County, Pennsylvania, and that portion of Buck's County Pennsylvania within 15 miles of the Town of Phillipsburg, New Jersey. Trading Area B—all of Warren County, New Jersey; Northampton County, Pennsylvania, Allentown, Pennsylvania; and the northwest corner of Hunterdon County, New Jersey (Alexandria Township, Bethlehem Township, Bloomsburg Borough, Clinton Town, Clinton Township, Franklin Township, Frenchtown Borough, Glen Gardner Borough, Hampton Borough, High Bridge Borough, Holland Township, Kingwood Township, Lebanon Borough, Milford Borough, Raritan Township and Union Township), and that portion of Buck's County, Pennsylvania within 15 miles of the Town of Phillipsburg, N.J.

It has been proven that area selected by the District Court is an appropriate area, and that all banks within the area are accessible to all persons and businesses within the area. Some banks within the area are not too aggressive and are satisfied with present business confined to a small area, others are aggressive and seek business throughout the area. The fact that some banks are complacent and do not seek additional business in the area, doesn't limit the relevant geographic or trading area. Phillipsburg National proved the area to be larger than Easton-Phillipsburg when it hired a consumer loan specialist. This specialist generated substantial consumer loans in Lehigh County and Allentown and Bethlehem, but was forced to cut back due to lack of funds. The Allentown-Bethlehem areas were cut off. (A. 410).

A number of other businessmen, such as, automobile dealers, contractors, a television sales and service dealer, and a food and department store owner, testified that they considered the trading area to be within a radius of 25-30 miles of Phillipsburg. The Director of Advertising from the Easton Express stated the paper's circulation was primarily within a 20 mile radius. The paper covered the eastern portion of Northampton County, Pa., and was the dominant newspaper in Warren and Hunterdon Counties, New Jersey. The Lehigh Northampton Joint County Planning Commission considered Lehigh, and Northampton Counties in Pennsylvania, and Warren County in New Jersey as an integrated trade area.

There was testimony that the Standard Metropolitan Statistical Area (SMSA) was the appropriate trading area and it was used by National Advertisers and other businesses in marketing their products. Prudential Life, making an independent analysis of the area in an

effort to ascertain the proper trading area for its purposes, determined the trading area to be identical with the ABE-SMSA selected by the U.S. Bureau of the Census.

The distances people daily travel from their places of residence to work is another important factor supporting a 25-30 mile radius from Phillipsburg as the socio-economic area for this case.

Banks in Easton, and Bethlehem and Nazareth devote some of their energies to soliciting business in Phillipsburg. The defendant banks do business in all counties in the District Court's geographic area. The Felmington National Bank in Hunterdon County competes with the banks in Phillipsburg as do many other banks in Warren County. The First National Bank of Milford, N. J., (app. 14 miles south of Phillipsburg) advertised in the Easton Express "Don't let a few miles stand between us."

There was, of course, an abundance of testimony to the effect that the Girard Trust Co., branch located in Reigelsville, Pa., which is in the northeast corner of Bucks County, competed vigorously throughout the District Court's geographic area. Practically all banks in said trading area complained of losing business to the Girard branch in Reigelsville. In fact the Reigelsville branch of Girard Trust derived almost one-third of its business from Phillipsburg-Easton and environs. Girard Trust's own survey shows extensive competition throughout the District Court's trading area.

The District Court considered all the evidence in the case and then made its determination of the relevant geographic area stating

> "... it would be expected that a higher percentage of deposits and loans would be derived from a

> heavily populated area of the market than from one that was sparsely populated. But that circumstance would not be a valid reason for moving the small town out of the relevant market. If the ratio of business on a per capita basis were the same or comparable, the small town belongs in the market. Any other approach would exclude most of the suburban areas. Moreover, even if little or no business is presently derived from a particular locality, if there is convenient ease of access to the market, the potential use as a satisfactory, convenient alternate choice should be considered.

This Court in *Philadelphia National,* did not confine the determination of a geographic area to where the effect on competition will be direct and immediate, but continued a discussion of the matter and stated by quoting for emphasis the test in *Tampa Electric Co.* v. *Nashville Coal Company,* 365 U.S. 320, 327, as follows p. 359

> . . . the area of effective competition in the know line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practically turn for supplies* (Emphasis by this Court.)

Case Moot by Virtue of New Jersey Banking Laws

Irrespective of whether the District Court was right or wrong in its determination of the relevant geographic area and the product market, the amendment to the New Jersey Banking Law created a new geographic area.

This new law has divided the state into three banking districts for the purpose of merger and branching. Prior to the new Act such activity by a bank was confined to the County in which the bank was located. As

a result, Phillipsburg National and Second National are now in the first banking district, which consists of seven counties, namely, Essex, Hudson, Bergen, Passaic, Morris, Sussex, and Warren. The largest banks in the state are located in this district. The four largest have deposits in excess of $500 million; the next four have deposits in excess of $300 million; and the next eleven have deposits in excess of $100 million. Phillipsburg National ranks 44th and Second National 58th in this district. If the merger is consummated they will rank 26th in the district. (IX-30, A. 868-70, A. 581).

The new law has created a new geographic area for Phillipsburg National and Second National must now compete with all commercial banks[18] in the first banking district. Already large and substantial banks have begun to move into Warren County and the other counties in the district either by merger or by branching. (IX-30, A. 866-78, A. 581; IX-31, A. 894, A. 581).

The competitive report of the Department of Justice submitted to the Comptroller of the Currency in connection with the merger of Washington Trust Company of Warren County into the National Newark and Essex Bank, Newark, N. J., a bank with deposits about $580 million, fully recognized the significant changes the new law had produced and advised the merger would have no significant effect on existing and potential competition. It stated that "the recent broadening of the geographic boundaries of permissible branch office operations by commercial banks in New Jersey has induced substantial market activity both by *de novo* branching and by merger." The competitive report

[18] The Act also applies to savings banks and building and loan associations. (N.J. Stat Ann. § 17:12B-26)

stated in conclusion (p. 4): "Therefore, this acquisition of one of the smallest banks (deposits of over $16 million) in the First Banking District does not seem likely to have a significantly adverse effect on potential competition." The competitive report by the Board of Governors of the Federal Reserve Board (p. 2) on the same merger also recognized the change which the new law had produced and reached the conclusion the merger would have no adverse effects. (IX-30, A. 866, A. 581).

It is obvious that now the merger of Phillipsburg National and Second National must be considered in the light of the new New Jersey banking law which has put it in the first banking district for merging and branching. This is the geographic area in which all banks headquartered in the seven counties included therein may merge or branch. This is the smallest relevant geographic area for the purposes of this merger.[19] In the *Philadelphia National* case, *supra,* this Court said (p. 361)

> "We think that the four-county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate "section of the country" in which to appraise the instant merger than any larger or smaller or different area."

As the statistics in this case show there are approximately 87 commercial banks in the first bank district

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[19] Because Easton and Phillipsburg have been so closely associated economically and socially for practically the last century, Easton and environs can indeed be a part of the geographic area.

and the largest banks in the State are in said district. Phillipsburg National and Second National are practically midgets among giants. The merger in terms of concentration of banking assets, deposits, loans or any other criteria is totally meaningless. (Yet to these two banks it is a matter of life or death and will be procompetitive and beneficial to the community).

Since the new New Jersey banking law has created the first banking district, which the State obviously recognizes as a meaningful banking community, the competitive effect of the merger of these two small banks is *de minimus,* if indeed, there is any effect. However, the real effect of the new law is to make this merger case moot. This case was tried prior to the passage of the new law and under the standards of the old law.

As the effect of the new New Jersey banking law is to make this case moot, the opinion of the District Court permitting the merger *because of no anti-competitive effect* should be affirmed. Affirming the District Court on these grounds makes consideration of Appellants questions III and IV unnecessary. These two questions are to be considered only if the Court finds anti-competitive effects. See *United States* v. *First City National Bank of Houston,* et al. 386 U.S. 361, 365 (1967); *United States* v. *Third National Bank of Nashville,* et al, 390 U.S. 171, 184 (1968).

Appellant's Geographic Areas Not Sections of the Country

Appellee Intervenor contends the geographic areas alleged by Appellant are not "sections of the country." Appellant alleged Easton, and Phillipsburg as the relevant geographic area, and now Phillipsburg as a submarket.

Certainly Phillipsburg, New Jersey, which has had no population change for over 15 years, has no land available for development, (T 825) and has such a limited variety of goods offered by its stores that one cannot purchase a man's suit of clothes there, (T 894; 1348) cannot by any stretch of the imagination be considered a "section of the country", or an "economically significant market" within the meaning of Section 7 of the Clayton Act.

As enacted in 1914, Section 7 of the Clayton Act read in pertinent part "or to restrain such commerce in *any section or community. . . .*" When the Section was amended in 1950 by the Celler-Kefauver Act to bring asset acquisitions within the purview of the statute, the term "section or community," *inter alia,* was changed to its present language. In his landmark opinion in *Brown Shoe Company* v. *United States,* 370 U.S. 294 (1962)—the first major examination of the Celler-Kefauver Act—Chief Justice Warren noted that:

> The deletion of the word 'community' in the original Act's description of the relevant geographic market is another illustration of Congress' desire to indicate that its concern was with the adverse effects of a given merger on competition only in an *economically significant* 'section' of the country. (Id. at p. 320)

He added later that:

> The 1950 amendments made plain Congress' intent that the validity of (mergers) was to be gauged on a broader scale; their effect on competition generally *in an economically significant market.* (p. 335)

These understandings formed the rationale for his conclusion that:

> The geographic market selected must, therefore, both 'correspond to the commercial realities' and *be economically significant.* Thus, although the geographic market in some instances may encompass the entire Nation, under other circumstances it may be as small as a single metropolitan area. (Id. at pp. 336-7) (Emphasis supplied throughout.)

This approach was confirmed by Mr. Justice Brennan in the *Philadelphia National Bank* case when he noted defendant's concession that the Philadelphia area (population 2 million plus) had "sufficient commercial *importance* to qualify under *Brown Shoe Co.* . . . as a 'section of the country' within the meaning of § 7" (374 U.S. 321, 359 (1963). (Emphasis added.)

The latest population figure for Phillipsburg Township as of July 1, 1969 was 18,510. (IX-30, A. 883, A. 581). For the country the population figure for 1960 was about 200,000,000.[20] Commercial bank deposits in Phillipsburg, as of June 30, 1969, were $57 million, (IX-30, A. 868-70, A. 581) while commercial bank deposits for the country for 1960 were $230,532,000,000[21] and for the country for 1968, $437,489,000,000.[22] These numbers would not appear to support a conclusion that Phillipsburg is an "economically significant market" of "sufficient commercial importance" to be a "section of the country" under the criteria set forth by the

[20] 1960 Census of Population, Vol. I p. S16.

[21] 1960 Annual Report of Federal Deposit Insurance Corp., p. 143.

[22] 1968 Annual Report of Federal Deposit Insurance Corp., p. 185.

Supreme Court. Furthermore, unlike, Philadelphia, Phillipsburg is not a "metropolitan area" either in population or in economic strength. Even conceding for the sake of argument that Chief Justice Warren's definition of "as small as a metropolitan area" meant "as small as the smallest metropolitan area." Phillipsburg still falls well outside the lowest parameter. The smallest metropolitan area in the United States as of January 1, 1968, was Midland, Texas, with a population of 68 thousand and with bank receipts of $208,535,000.

During the Senate Hearings on the Celler-Kefauver Act, Senator Donnell, the principal opponent of the Act, and Congressman Celler, its author, and witnesses from the Federal Trade Commission deleted the various provisions of the Act and came to an understanding that it was not designed to reach small communities and their surrounding territories. Communities mentioned as not being "sections of the country" were Oshkosh, Wisconsin, with a population in 1950 of 91,103; Tallahassee, Florida, with population in 1950 of 51,590; and Dothan, Alabama, with a population in 1950 of 46,522.

It appears conclusive that Phillipsburg, New Jersey has not the "commercial importance" or the "economic significance" to be a "section of the country" within the intendment of the framers of the statute as interpreted either by them or by the Supreme Court. To say this is not to abandon antitrust inquiry into essentially local markets. Presuming the existence of interstate commerce, the Department of Justice may always inquire under the somewhat stricter standards of Sections 1 and 2 of the Sherman Act.[23] Nor is inquiry

[23] 12 U.S.C. § 1 and 2.

precluded into the acquisition of a bank which does business only in a single county or city if the merger is alleged to have substantially anticompetitive effects in some acceptably significant "section of the country." But Appellee Intervenor rejects the *reductio ad absurdum* which would conceive as "economically significant" or of "commercial importance" a so-called market as Phillipsburg, New Jersey.

Likewise, the Easton-Phillipsburg area should not be considered a "section of the country." Easton, Pennsylvania with a population of 31,955 in 1960 has had a decrease in population from a figure of 35,632 in 1950, and a figure of 33,589 in 1940.[24] The cities or townships of Easton and Phillipsburg together had a total population in 1960 of 50,465. The total deposits of the two combined amounted to about $158 million.

The largest bank in the geographic area selected by the District Court, First National Bank & Trust, Bethlehem, Penn., had deposits of $102,898,000. The total deposits of all commercial banks in the District Court's geographic area were $542,181,000. (306 F. Supp. 645, 657-8).

Standards Applied by District Court in Assessing and Weighing the Convenience and Needs of the Community Was Not Erroneous

It must be pointed out at this point that Appellant does not refute the District Court's ruling that there are serious and important convenience and needs to be met and that the merger will help bring these benefits in the public interest. Nor does Appellant disagree with the ruling that if the gains in better services outweigh the anticompetitive effects and the necessity of

[24] 1960 Census of Population, Vol. 1, Chap. 40-34.

the merger to secure the net gain in the public interest,[25] the merger should be approved, as was stated in the *Third National Bank in Nashville* case, *supra*, p. 189. Appellant contends the District Court applied erroneous standards in weighing the convenience and needs against anticompetitive effects and that the convenience and needs to be derived from the merger cannot apply to a narrower area than that which the District Court selected as the relevant geographic area *in which to assess any anticompetitive effects of the merger*, but must apply to that whole relevant geographic area.

Appellant contends the District Court must necessarily come to a proper conclusion as to the anticompetitive effects before it can properly apply the convenience and needs factors against the anticompetitive effects. This is clearly an erroneous contention. It has long been recognized that legal problems and factual situations can be considered in the alternative. Appellee Intervenor believes the District Court came to a proper conclusion as to the anticompetitive effects. But, assuming the District Court did not come to a correct conclusion, said Court can still assume the anticompetitive effects as alleged[25a] and then properly weigh the convenience and needs against such anticompetitive effects. Appellee Intervenor believes such a fact does not even need stating but feels compelled to do so because Appellant contends to the contrary.

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[25] See also, Northern Lines Case, *United States* v. *Interstate Commerce Commission*, et al., 396 U.S. 491, 514-515, (1970).

[25a] The district court did assume all anticompetitive effects alleged by plaintiff when it said (A 699) "The Court finds that there is a preponderance of evidence showing that any conceivable anticompetitive effect of the merger is clearly outweighed . . ." There is no doubt that the Court meant by the expression "any conceivable anticompetitive effect" any anticompetitive effect the plaintiff had alleged.

The District Court did properly weigh the convenience and needs against the anticompetitive effects. The District Court went to great lengths to specifically show what was needed in the community to be served, who needed it and how these convenience and needs would be furnished by the merger and to whom. (A. 689-699). Approximately ⅓ of the District Court's opinion was devoted to the weighing process. The District Court had a plethora of evidence proving the need for a bigger bank; trust services, with a fulltime trust officer; commercial and industrial lending specialist; mortgage lending specialist; higher lending limit; better services; new competent management personnel; and of great importance a more competitive bank (See Appellee Intervenor's Statement of Facts pp. 20-31 of this brief).

The District Court assumed all the anticompetitive effects alleged by plaintiff and then elaborately and carefully weighed the convenience and needs against such anticompetitive effects. A very proper weighing test was done by the District Court and its conclusion was more than adequately supported by evidence introduced at the trial. What more can be done?

Appellant's contention that community convenience and needs should be evaluated in the same geographic area as the competitive effect is clearly not correct, nor does the Bank Merger Act of 1966[26] so state.

The applicable portion of the BMA-66 reads:

> (c)(5) The responsible agency shall not approve—
>
> (B) any other proposed merger transaction whose effect in any section of the country may be sub-

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[26] Public Law 89-356, 64 Stat. 892, 12 USC § 1828(c).

> stantially to lessen competition, or to tend to create a monopoly, or which in any other manner would be in restraint of trade, unless it finds that the anticompetitive effects of the proposed transaction are clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community to be served.

It is obvious from a reading of this applicable portion of the statute that the competitive effects are to be assessed in a "section of the country" while the convenience and needs which must be weighed in the public interest against the anticompetitive effects apply to "the community to be served" which may be a smaller community than the section of the country for competitive effects or even a larger community, and, of course it can also be the same as the area determined to be the section of the country.

The important point which apparently Appellant has missed is whether the convenience and needs outweigh the anticompetitive effects. The community to be benefited can be larger or smaller than the "section of the country" as long as the convenience and needs in the public interest outweigh the anticompetitive effects. There is no doubt this is the proper interpretation to be used in weighing the convenience and needs in the public interest.

This position is supported by explanatory remarks of various Congressmen, whether for or against the Act. (See 112 Cong. Rec. 2-8-66 p. 2456-7, 112 Cong. Rec. 2-9-66 p. 2663; House Report 1173 p. 3). In answer to a question by Senator Long, Senator Robertson stated: (112 Cong. Rec. 2-9-66 p. 2663)

> "The bill makes clear that while the anticompetitive effects of a proposed merger are to have

great weight, the probable effects of the merger on the public interest are to be controlling. Thus any particular community may have a banking need which can be supplied by the merged institution, the fulfilling of which may be so beneficial to the public interest that it outweighs any anti-competitive effect of the merger.

Mr. LONG of Missouri. What area is encompassed by the term "community to be served" in the bill?

Mr. ROBERTSON. This means the entire area to which services are or could be supplied by the proposed merged institution, and such area is of course not limited by city, county, or State geographical boundaries. As I have said earlier, the emphasis here should properly be on the words "to be served." A big New York bank serves local customers in New York, and it serves the big nationwide industrial firms across the country and around the world. Artificial boundary lines, branching areas limited in one way or another by the different States have little or no significance.

In *First National Bank of Jackson, supra,* it had been agreed and stipulated by all parties that the relevant geographic area in which to assess the anticompetitive effects was Leflore County. Nevertheless, Judge Nixon held, in addition to benefits to Leflore County, that there would be substantial benefits from the merger to the Mississippi Delta area which embraces several counties, (p. 1222) and benefits from the merger to the whole State of Mississippi (p. 1224). Judge Nixon held the convenience and needs to result from the merger clearly outweighed the anticompetitive effect of the merger in each of the three areas to be benefited by the merger. (p. 1227).

Appellant must indeed be grasping at straws in contending such a ruling was erroneous.

Appellant's Contention that the Merging Banks—and the District Court—Failed Adequately To Consider a Less Anticompetitive Alternative Is Not Supported by the Facts

The facts in this case show that Phillipsburg National and Second National need more capital. (T 559-560, 586, 598). Second National's ability to compete has been limited because of capital deficiency (R. 117 Daubert's deposition). Both banks are unable separately to pay the salaries needed to attract competent personnel. (A. 538; R. 1306; R. 134 Casteline deposition). There was an excess of evidence proving both banks' need for a full-time trust officer, a C&I specialist, a mortgage specialist, a larger lending limit, management personnel, and of great importance the need to be more competitive. (See pp. 20-31 of this brief). These two small banks' immediate problem is to become large enough to compete with the competition they are facing. They have gone as far as they can go separately and have reached the position where they are no longer competitive and must seek a way to fortify their competitive positions. (A. 383-384; 506; 650).

The prospects of Phillipsburg National and Second National are glum because of problems of personnel and management. Neither can "make it" without a merger. (A. 483-484; R. 133-134 Casteline deposition). Top management of both banks are old and want to retire, but there are no younger men in either of the banks to replace them. (See pp. 20-22; 31-33 of this briefs). Three officials of substantial banks testified there was no future for these two banks separately. (A. 154; 483; R. 133-134 Casteline deposition; see also pp. 33-34 of this brief).

In contending that alternatives were not seriously pursued Appellant states in its brief the only evidence of attempt to find qualified bank officers was a discussion by Second National with an officer of Chemical Bank of New York. This is absolutely false and shows a lack of knowledge of the record. (See pp. 31-32 of this brief).

The record is clear that Second National contacted William Greenley, Senior Vice-President of Fidelity Union Trust Co., Newark, N. J., which was a correspondent bank for Second National, and not only asked advice as to what it could do to correct its problems but also asked Mr. Greenley to find competent personnel (A. 151-154). For over a year constant attempts were made to find personnel to fill management positions. Competent personnel could not be found who were interested in locating in Phillipsburg. An assistant Vice-President at Fidelity Bank rode to Phillipsburg with Mr. Greenley on several occasions and looked the bank over, but he showed no interest. (A. 169-170).

During July 1967, Thomas Armstrong, a Director of Second National for fifteen years, spoke to a Robert Van Buren, a Vice-President for Chemical Bank of New York about coming to work for Second National and also asked for suggestions as to other persons who might be interested, but to no avail. Mr. Van Buren wanted a salary in excess of $30,000 per year, plus other commitments. (A. 406-407). A Mr. Seiss, another Director of Second National, as well as other members of the Board of Directors attempted continuously to locate and attract prospective management candidates, but were unsuccessful. (A. 406).

Efforts had been made by Phillipsburg National to obtain competent executives but without success (A.

264, 325; 649-650; R. 233-234 Curry deposition). The Directors of Phillipsburg National had almost weekly discussions on how and where they could find successor management. (A. 325). The President of Phillipsburg testified he had not gone out and tried to fill the management gaps because he knew the salaries this replacement personnel were asking and he knew the bank could not afford to pay such salaries (R. 233-234, Curry deposition).

What more could be expected? Certainly this recruitment activity is in line with this Court's ruling in the *Third National Bank of Nashville* case, *supra*, where it stated (p. 190):

> "The Act directs the agencies and the courts to consider managerial as well as financial resources in weighing a proposed merger. However, the Act requires as well that the 'future prospects of the existing and proposed institutions' be appraised. Part of such appraisal, where managerial deficiencies exist as they do in this case, is determining whether the merging bank is capable of obtaining its own improved management. *This test does not demand the impossible or the unreasonable.* It merely insists that before a merger injurious to the public interest is approved, a showing be made that the gain expected from the merger cannot reasonably be expected through other means." (Emphasis supplied).

The Senior Vice-President of Fidelity Union Trust Co. recommended to Second National that a merger with Phillipsburg National was the only way to solve their problems. (A. 154). The President of the Hunterdon County National Bank, Flemington, N. J., testified Phillipsburg National and Second National wouldn't have a chance if they remained separate banks. (A. 483). The President of an Allen-

town, Penn., bank said he would be "real worried" about the future of these two banks as separate entities. (R. 133-134, Casteline deposition).

Appellant suggests as an alternative "less anticompetitive" measure that these banks each merge with other banks. Is this "less anticompetitive?" These two small banks are attempting to solve their problems and become effective competitors in their area. With the change in the New Jersey Banking Law, their alternative is to each merge with large Newark banks, which are not only available, but sitting on their hands in the wings waiting to grab them. (IX-30, A. 866-878, A. 581). Is it "less anticompetitive" to have the largest banks in the state grow larger by acquiring the smaller banks, and eliminating two banks which are interested in being competitive? It is Appellee Intervenor's firm belief it is in the public interest and most pro-competitive to let these two small banks merge and grow to effectively give competition to the largest banks in the area. This is truly in keeping with the purpose of the antitrust laws.

SUMMARY AND CONCLUSION

The two banks involved in this merger, Phillipsburg National and Second National are small banks in absolute terms. They are so small they cannot compete in their area or give the community the needed banking services. They are hopelessly beset with management and personnel problems, lack of financial resources, and cannot serve the community which has caused hardships to business people in the community. They cannot grow separately, and thus need the merger. They cannot solve management and personnel problems without the merger. Not only could they not compete

with other banks at the time of the trial, but subsequent to the trial the New Jersey legislature passed an amendment to the New Jersey Banking Law which placed these two banks in the newly created first banking district, which consists of seven counties, namely, Essex, Hudson, Bergen, Passaic, Morris, Sussex and Warren. The new Act permits merging and branching district-wise as opposed to the old restriction of only county merging and branching. The largest banks in the State of New Jersey are located in this first banking district.

If these two small banks couldn't compete before, think of the problems now confronting them!

It is the Appellee Intervenor's firm belief that, irrespective of the fact these banks are located in the same city and a block away from each other; and irrespective of what the geographical area might be or what the product market or line of commerce might be, these two banks should be permitted to merge as it is a procompetitive merger, a merger of two small banks attempting to grow, to solve their problems, and to furnish sorely needed banking services. This is in accord with this Court's rulings in *United States* v. *Philadelphia National Bank* et al., 374 U.S. 370-371 (1963) and *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).

These two banks will be unable to make a go of it separately. If they do not merge the only salvation is merger with the large Newark banks. This would only mean greater concentration of bank resources in the hands of the larger banks and the elimination of two small banks. As a result of the New Jersey Banking Act the large banks have already started to merger

and branch district-wise. To allow this to happen and to prevent this merger would be directly opposite to the purpose of the antitrust laws which is to foster competition. These two small banks should be given the opportunity to grow and become a competitive factor in their immediate area and in the first banking district of New Jersey.

The District Court's ruling on the product market or relevant line of commerce was correct. After this Court's ruling in the *Philadelphia National Bank* case, *supra,* Congress has passed the Bank Merger Act of 1966 (BMA-66) which intended the banking agencies and Courts to consider the competition of other financial institutions in determining the proper line of commerce. Since the *Philadelphia National Bank* case, *supra,* and the passage of BMA-66, five distinguished District Courts have rejected Appellant's contention that "commercial banking" is unique and separate line of commerce. All considered the competition of other financial institutions in determining the proper product market or line of commerce.[27]

The fact that commercial banks issue checks and no other financial institutions to any great degree issue checks, does not in and of itself give a unique and separate status to all other functions of a bank which compete vigorously with other financial institutions. This one function, acceptance of demand deposits, does not make all functions a unique combination. One must face the facts of life as to competition. There are many other institutions, including the U.S. Govern-

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[27] *U. S.* v. *Crocker-Anglo National Bank,* et al., *supra; U. S.* v. *Provident National Bank,* et al., *supra; U. S.* v. *First National Bank Jackson,* et al., *supra; U. S.* v. *Phillipsburg National Bank & Trust Co.,* et al. (the case before this Court); and *U. S.* v. *First National Bank of Maryland, supra.*

ment, competing for the savings dollar; and many other institutions competing in the credit field.

As to Appellant's contention the District Court erred in applying convenience and needs to a narrower geographic area than the geographic area selected by the Court as relevant to this case, Appellee Intervenor believes Appellant is desperately seeking for a way out by contending the convenience and needs of the community to be served must relate to a geographical area identical to the one the court selected in evaluating the anticompetitive effects of the merger. The applicable portion of BMA-66 does not so state.[28] All the statute requires in the weighing test of convenience and needs in the public interest against any anticompetitive for a merger to be permitted is that the convenience and needs clearly outweigh any anticompetitive effects. The District Court in the *First National Bank of Jackson* case, *supra,* applied convenience and needs not only to the stipulated relevant geographic area for assessing anti-competitive effects, but also to two larger areas, stating that the benefits accruing to each separately clearly outweighed any anticompetitive effects in said selected geographic area.

Appellant Intervenor also contends that Appellant's Easton-Phillipsburg, or the Phillipsburg relevant geographic areas are not "sections of the country" within the meaning of Section 7 of the Clayton Act. Therefore, Appellant has not proven a relevant geographic area in which to assess the anticompetitive effects of this merger.

Appellee Intervenor takes issue with Appellant's contention that the District Court erred in its deter-

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[28] Public Law 89-356, 64 Stot. 892, 12 U.S.C. § 1828(c)(5)(B).

mination of convenience and needs by failing to adequately consider whether the same benefits could be achieved by a less anticompetitive means. The District Court considered this problem on the basis of the evidence in the case. The facts in the case more than support the conclusion that there was no alternative for these two small banks.

Both banks were faced with desperate management and personnel problems. Both lacked capital and much needed specialists in several banking areas. Both banks needed a full-time trust officer, a commercial and industrial specialist; a mortgage specialist; a larger lending limit; and top management personnel. They had reached a point where they were not competitive and were not serving serious convenience and needs of the community.

Both banks made serious efforts over the years to obtain the needed personnel but were unsuccessful. Inability to pay salaries demanded by the personnel needed was an insurmountable obstacle. Second National consulted a Senior Vice-President of a large Newark bank for advice on how to solve its problems and for aid in obtaining personnel. This man worked diligently for over a year but was unable to get any personnel due to inability to pay salaries, the small size of the bank, and type of city in which the bank was located. Without the needed management and personnel and capital neither bank would be able to survive long as separate entities.

Officials of three substantial banks stated these two banks could go nowhere separately and their future was dismal without the merger. All felt the merger would be the salvation of these two banks and would give the resultant bank the needed personnel and cap-

ital to solve their problems to grow and be a competitive factor.

The only alternative to this merger would be mergers with other banks. The other banks waiting to acquire these two small banks are the large Newark banks. This would result in the large Newark banks obtaining a greater concentration of the banking resources in the State, which would be in itself anticompetitive, and eliminate two banks from the picture. On the other hand the merger of the two small banks would be pro-competitive and certainly more in line with the aims of the antitrust laws than to have them acquired by the largest banks in the state.

Appellee Intervenor therefore requeste the opinion of the District Court be affirmed as this merger is in the public interest, will be pro-competitive, furnish serious convenience and needs of the community, and save these two banks so they together can become a forceful competitor in the area.

Respectfully submitted,

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